

PUBLIC VERSION

**BEFORE THE
SURFACE TRANSPORTATION BOARD**

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M & G POLYMERS USA, LLC)	
	Complainant,)	
)	
	v.)	Docket No. NOR 42123
)	
CSX TRANSPORTATION, INC.)	
	Defendant.)	
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PETITION FOR RECONSIDERATION

I. INTRODUCTION.

Pursuant to 49 CFR § 1115.3, Complainant M&G Polymers USA, LLC (“M&G”) respectfully petitions the Board to reconsider, on grounds of material error and changed circumstances, several aspects of its September 27, 2012 decision (“Decision”) in the above-captioned proceeding. In support of this Petition, M&G states as follows.

II. PREFACE AND SUMMARY OF ARGUMENT.¹

The Decision applied the standard of 49 USC § 10707 to find that CSX Transportation, Inc. (“CSXT”) is market dominant over 60 of 69 issue movements.² As part of its analysis, the Board concluded that the challenged tariff rates for nearly all of the contested movements are not effectively constrained by much higher cost (not rate) truck and transload alternatives. Although M&G agrees with this conclusion, it believes that changed circumstances and material error warrant reconsideration of several aspects of that Decision. The changed circumstance is the

¹ The “Preface and Summary of Argument” may be up to three pages in length, and it does not count against the twenty page limit for Petitions for Reconsideration. See 49 CFR § 1115.3(d).

² CSXT did not contest its market dominance over 26 of the 69 issue movements. See Decision at 20.

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Board's adoption of a "refined approach" to market dominance based upon the calculation of a "Limit Price" R/VC ratio, which M&G refers to as the "LP Methodology." The material error is the Board's dismissal of, or failure to consider, certain evidence presented by M&G.

The LP Methodology, which neither M&G nor CSXT proposed, was announced by the Board for the very first time in the Decision. In relying primarily upon the LP Methodology to determine whether alternative transportation options provide "effective" competition, the Board overlooked, ignored, or disregarded portions of M&G's evidence that would provide an independent basis for finding market dominance under a traditional market dominance analysis. Given the controversy that already is surrounding the newly-adopted LP Methodology,³ M&G asks the Board to reconsider its extensive reliance upon that methodology in this case by including findings based upon a traditional market dominance analysis. Otherwise, M&G's case could hinge upon the Board's new and untested LP Methodology, thereby subjecting M&G to additional delays beyond the 28 months that it already has experienced just to obtain a market dominance decision.

Although the Board has used the LP Methodology to evaluate market dominance for nearly all of the contested movements, the primary value of the LP Methodology is in determining whether effective competition exists for those lanes where the transportation alternative has a similar or lower rate. For many of the case lanes, the LP Methodology is redundant because the Board need only look at the significantly higher alternative transportation rates to conclude that those rate levels cannot be effective competitive constraints. Where the alternative rates are similar or lower, M&G has presented extensive amounts of other evidence

³ See Letters filed in this docket by Union Pacific Railroad and Norfolk Southern Railway, dated October 9, 2012, and by BNSF Railway letter dated October 16, 2012, alleging procedural and substantive flaws.

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that, when viewed holistically, easily enable the Board to reach the same market dominance conclusions in the Decision as it has under the LP Methodology. The Decision, however, overlooks, ignores, or disregards much of this other evidence that explains why alternative transportation is not an effective competitive constraint. Moreover, the presence of independent evidence that corroborates the results produced by the LP Methodology could justify the reasonableness of that approach in this case.

In several instances where the Board did consider M&G's other evidence, its dismissal of this evidence was material error that should be reconsidered. For example, M&G submitted substantial historical rate evidence to show that alternatives are not effective competitive constraints, consistent with the Board's conclusions based upon the LP Methodology. This evidence reveals that CSXT has imposed dramatic rate increases on the issue lanes over a very short time period, with no diversion of traffic to alternative transportation. If these alternatives were effective constraints, CSXT could not have imposed such extensive rate increases.

The Board also improperly struck the testimony of M&G witness Robert Granatelli. The simple fact is that CSXT never moved to strike the Granatelli testimony. Therefore, note 24 of the Decision is material error, as is every other instance of the Board discounting or disregarding M&G's position because it is supported by Mr. Granatelli.

The Board failed to consider both the circumstances of when trucks are used, which is essential to whether trucking is feasible, and also the small percentage of truck shipments. In dismissing M&G's evidence of the small proportion of truck shipments, the Board has erroneously discounted the very type of feasibility evidence it determined to be relevant in Market Dominance Determinations, 365 ICC 118 (1981). In addition, the Board's failure to address the circumstances of truck shipments ignored other evidence that it has held to be

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relevant. Finally, in support of its position, the Board incorrectly interpreted and/or applied agency precedent. See Decision at 27. All of the foregoing constitute material error.

Next, the Board erroneously ignored the advantages of rail transportation over trucks. The Decision's discussion of these two modes focused solely on the benefits of trucks, and seems to recognize rail as superior only to transloading. The evidence, however, shows that trucks are advantageous only for serving non-rail customers, small volumes, short distances, and for expedited shipments.

The Board's conclusion that double-transloading is feasible because it does not raise product integrity concerns is not supported by the evidence. Although double transloading requires transloading both from rail-to-truck and truck-to-rail, the Board ignored all the evidence that truck-to-rail transloading poses much greater problems, and that such transloading does not occur in the real world because it is impractical in the ordinary course of business. See Reb. Ev. at II-B-45. Instead, the Board erroneously based its conclusion that double-transloading is feasible solely on a conceptual proposal that was never adopted or validated in the real world.

Finally, the Board committed material error by using incorrect alternative transportation prices for Lanes B-5 and B-50.

III. ARGUMENT.

A. **The Board erroneously ignored the substantial rate history and traffic data submitted by M&G.**

As part of its Opening Evidence, M&G presented data showing the history of its rates and traffic volumes since 2008 in the issue lanes. See Op. Ev. at Part II-B-4 and Ex. II-B-22. The traffic volume data included both rail volumes and truck/transload volumes. The Board, however, completely overlooked the rate history and discounted the traffic data.

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When viewed together, the rate and traffic data show that CSXT has maintained a dominant market share despite rate increases that have been at least {{ }}⁴ for nearly every lane, and in the neighborhood of {{ }} for most lanes, over a brief two-year period. See Op. Ev. at II-B-53; Reb. Ev. at II-B-14-15. Because this is exactly the type of evidence that is considered relevant to the market dominance inquiry, the Board's disregard is both puzzling and material error. Special Procedures for Making Findings of Market Dominance as Required by the Railroad Revitalization Reform Act of 1976, 353 ICC 875, 929 (1976) ("Other factors which might indicate the absence of price or service competition include...the absence of any diversion after a reasonable time following a rate increase.").

Effective competition "means that, if a carrier raises the rate for such traffic, then some or all of that traffic will be lost to other carriers or modes." CF Industries, Inc. v. Surface Transportation Board, 225 F.3d 816, 821 (2001), quoting Market Dominance Determinations, 365 ICC at 129. If alternative transportation truly provides effective competition to CSXT rail service, then the dramatic rate increases of the past few years (see Op. Ex. II-B-22) surely would have resulted in diversion of traffic to these alternatives. However, no such diversion or loss of traffic occurred (see Op. Ev. Part II-B-4), which is a compelling indicator that transportation alternatives are not effective competitive constraints.

Furthermore, M&G's evidence shows that, to the extent the challenged CSXT rates are greater than or comparable to the rates of alternative modes, this observation is *after* CSXT substantially increased its rates, as opposed to a rate decrease in response to a competitive threat. Comparable or lower rates for alternative transportation have been found to constitute evidence

⁴ Pursuant to the Protective Order in this proceeding, information in single brackets { ... } has been designated "CONFIDENTIAL" and information in double brackets {{ ... }} has been designated "HIGHLY CONFIDENTIAL."

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of effective competition when railroads have *reduced* their rates to meet the competitive threat, *not increased them*. E.g., Consolidated Papers, Inc. v. Chicago & Northwestern Transp. Co., 7 ICC2d 330, 337-38 (1991) (trucks were effective competition because defendant had lowered its rail rates due to truck competition while also losing market share); FMC Wyoming Corp. v. Union Pac. R.R. Co., 4 STB 699, 713-14 (2000) (FMC had used the threat of switching to trucks credibly in the past to obtain rail rate reductions); Allied Chem. Corp. v. Ann Arbor R.R. Sys., 1 ICC2d 492, 506-07 (1985) (noting that “[w]idespread price reductions [to keep or attract this traffic] reflect the workings of a competitive marketplace.”), rev’d on other grounds, Gen. Chem. Corp. v. United States, 817 F.2d 844 (D.C. Cir. 1987).

Consequently, it was material error for the Decision to completely ignore some of M&G’s most compelling evidence that truck alternatives with similar or lower rates do not provide “effective competition” for the issue movements because CSXT is pricing up to higher cost (not rate) options. Although the Board did reach the correct conclusions for most lanes, it chose to rely upon its newly-proposed and untested LP Methodology to do so.⁵

The Board’s adoption of the LP methodology is a significant changed circumstance that also warrants reconsideration of the Decision. Although the LP Methodology reaches the same conclusions that can be drawn from M&G’s evidence, it is surrounded by a cloud of controversy that threatens to require even more time to reach a market dominance determination than already

⁵ The Board concluded that alternative transportation was an effective competitive constraint for Lanes A-4, B-15, B-24, B-35, and B-40, despite undisputed evidence that CSXT had increased its rates by triple digits (e.g., { }) over just a 2-year period. Op. Ex. II-B-22. Similarly, CSXT had increased its rates in Lanes B-6 and B-20 by { }, respectively. All of these rate increases occurred without losing the traffic to the alternatives that the Board finds to be effective constraints. Such enormous rate increases in such a short time span belie the notion that alternative transportation was constraining CSXT’s pricing at all, much less effectively. The fact that CSXT did not lose any of this traffic to those alternatives only reinforces that conclusion. See, note 6, infra. The Board’s failure to consider this evidence as an intangible factor to overcome the LP Methodology conclusions was material error.

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has passed. If for some reason the LP Methodology is overturned, this case would be subject to additional delay for a remand that would require the Board to consider the very evidence that M&G is asking it to consider now. Therefore, M&G urges the Board to consider this evidence that it has heretofore ignored, in order to provide a basis for its market dominance determination that is independent of the new LP methodology.

B. It was material error to strike Mr. Granatelli's testimony.

1. CSXT did not ask to strike Mr. Granatelli's testimony.

The Board erred when it *sua sponte* struck the testimony of M&G's witness Robert Granatelli. At footnote 24 of the Decision, on page 9, the Board stated that "we are also granting CSXT's motion [to strike] insofar as it asks us to strike Robert Granatelli's testimony." But, CSXT never asked the Board to strike this testimony; the CSXT Motion requests that:

For the reasons detailed above, the Board should strike the new evidence and arguments contained in M&G's August 4, 2011 Rebuttal Evidence claiming that the Board may not consider intermodal competitive options to CSXT rail service that do not originate at the CSXT Complaint origin and terminate at the CSXT Complaint destination.

See Motion to Strike at 14 (filed September 30, 2011). CSXT unequivocally moved to strike only that evidence and argument related to the fact that alternative transportation options proposed by CSXT did not match the origins and destinations of the challenged rates. Mr. Granatelli's testimony had nothing to do with that issue. In the introduction to its Motion, CSXT referred to Mr. Granatelli's testimony in two sentences, but only in the context of lamenting the size and length of M&G's Rebuttal Evidence. Mr. Granatelli is not mentioned anywhere else in the Motion. Nowhere did CSXT ask the Board to strike the Granatelli testimony, nor did CSXT term it improper rebuttal. The argument section of the Motion is entirely about what CSXT called M&G's "new legal theory," with no mention of Mr. Granatelli.

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The fact that CSXT did not ask the Board to strike Mr. Granatelli's testimony caused M&G not to even mention Mr. Granatelli in its Reply to the Motion. See Reply to Motion to Strike (filed October 14, 2011). It was clear material error for the Board to disregard the Granatelli testimony, because CSXT did not ask the Board to strike it. Indeed, the Decision is internally inconsistent on the subject of Mr. Granatelli. CSXT did not ask the Board to strike his testimony, and the Board said it was striking the testimony only "insofar as" CSXT requested such action. Given that CSXT did not request such action, the Board should have considered the Granatelli testimony in its Decision – which it did not do.

2. Governing authority and due process principles required consideration of the Granatelli testimony.

The Board is authorized to strike irrelevant, immaterial, or unduly repetitious material on its own motion. 5 USC § 556(d). See also 49 CFR § 1104.8 ("The Board may order that any redundant, irrelevant, immaterial, impertinent, or scandalous matter be stricken from any document."). Mr. Granatelli's testimony does not fit into any of these categories and, consequently, the Board should not have stricken it *sua sponte*.

The Board's action has deprived M&G of its right to present evidence and have its case heard before the Board. Under the Administrative Procedure Act, a "party is entitled to present his case or defense by oral or documentary evidence...as may be required for a full and true disclosure of the facts." 5 USC § 556(d). See also 5 USC § 554. The Board's own regulations express a similar sentiment. 49 CFR § 1114.1.

Furthermore, the decision to strike Mr. Granatelli's testimony has deprived M&G of its 14th Amendment due process right to present evidence and respond to the heretofore unknown possibility that this testimony would be stricken. Union Electric Company v. FERC, 890 F.2d 1193, 1202-1203 (D.C. Cir. 1989) (Due process clause of the 14th Amendment and the APA

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both require overturning FERC decision because party was not allowed to “offer evidence.”). Due process requires that a party “have an opportunity to be heard...and to offer evidence of his own.” Sprecht v. Patterson, 386 U.S. 605, 610 (1967). See also Brinkerhoff-Faris Trust & Savings Company v. Hill, 281 U.S. 673, 681 (1930) (“[D]ue process in the primary sense [means]...an opportunity [for the party] to present its case and be heard in its support.”). The Board has previously recognized this Constitutional right. Railroad Ventures, Inc. – Abandonment Exemption - between Youngstown, OH and Darlington, PA, in Mahoning and Columbiana Counties, OH and Beaver County, PA, STB Docket No. AB-556 (Sub-No. 2X), slip op. at 12 (served Dec. 15, 2005). Therefore, the Board committed material error in striking Mr. Granatelli’s testimony.

C. The Board’s disregard for M&G’s traffic data, and its failure to address the circumstances surrounding the use of trucks, was material error.

M&G presented several years of historical traffic data by mode, and evidence of the circumstances in which both M&G and the polymer industry use trucks. The Board committed material error by dismissing the significance of the former and failing to consider the latter at all. The Board also erroneously attempted to justify the foregoing errors based upon incorrect interpretations of its precedent.

1. The Board disregarded evidence of the type that its own precedent has determined to be highly relevant.

The Board has improperly dismissed or failed to consider evidence that its own precedent declares to be highly relevant to the market dominance determination.

First, the Board erroneously concluded that truck delivery is feasible because M&G regularly supplies PET to customers *without rail access*, even though agency precedent clearly states that effective competition may be deduced from the amount of a commodity “that is

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transported by motor carrier *where rail alternatives are available.*⁶ See Decision at 27, n. 80.

The Board's conclusion dismissed M&G's evidence that it used trucks to transport as little as {{ }} and no more than {{ }} of its total PET volume in any single year, from 2006-2010, to serve customers that had a choice between truck and rail service. See Op. Ev. at II-B-20-21 and Ex. II-B-4; Reb. Ev. at II-B-53. M&G also provided relevant evidence on truck and rail volumes for each individual case lane, showing that nearly every lane had zero or negligible truck volumes.⁷ See Op. Exs. II-B-5 and 6; Reb. Ex. II-B-12.

Second, although agency precedent states that effective competition may be deduced from the amount of a commodity "that is transported by motor carrier under transportation circumstances (e.g., shipment size and distance) similar to rail,"⁸ the Board failed to consider M&G's evidence of the circumstances in which its truck shipments have occurred. M&G explained that truck shipments are almost entirely limited to low volumes, short hauls, emergency shipments, and customers with no rail access.⁹ M&G supported its testimony with evidence that its PET volume transported by motor carrier, from 2006-2010, ranged only from {{ }} of its total volume and that from one-half to two-thirds of those truck shipments, depending upon the year, were to destinations without rail access. See Op. Ev. at II-B-20; Reb.

⁶ Market Dominance Determinations, 365 ICC at 133 [italics added]; Product and Geographic Competition, 2 ICC2d 1, 21 (1985). See also Op. Ev. at I-6 and II-B-18-20; Reb. Ev. at II-B-53.

⁷ Of the nine lanes where the Board found effective competition, Lanes {{ }} had 0% truck volume in the five-year period covered by M&G's data. See Op. Ex. II-B-5. {{ }}

}} M&G provided evidence of extenuating circumstances necessitating truck shipments in {{ }} See Op. Ev. at II-B-91-92 and 101-102.

⁸ Market Dominance Determinations, 365 ICC at 133; Product and Geographic Competition, 2 ICC2d 1, 21 (1985). See also Op. Ev. at I-6 and II-B-18-20; Reb. Ev. at II-B-53.

⁹ See Op. Ev. at II-B-20, 24, 26 (n. 15), and 37; Reb. Ev. at II-B-39-50. These statements were sponsored by M&G employees Andre Meyer and Melba Aguilar.

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Ev. at II-B-39-44. Furthermore, M&G demonstrated that the typical distance for its PET truck shipments is much shorter than the typical rail distance. See Reb. Ev. at II-B-42. M&G also presented evidence that 90% of the plastic resins in the U.S. leave the manufacturing facility by rail. See Reb. Ex. II-B-15, p. 4. M&G presented evidence that even CSXT's own witness admitted that "virtually all" polymer product at his previous employer was transported by rail. See Reb. Ex. II-B-3. Other parts of CSXT's own evidence also confirm the limited role of transloading in the PET industry. See Reb. Ev. at II-B-40. Although M&G presented abundant evidence under this market dominance standard, the Decision does not mention this standard or much of this evidence, except for the traffic data, which the Board concluded was "insufficient to demonstrate that overwhelming customer preference for delivery of PET by rail renders delivery by truck infeasible." See Decision at 27.

Despite the fact that M&G provided substantial evidence in the specific areas requested by Board precedent, the Board inexplicably disregarded that evidence. See Decision at 26-27. This is an erroneous departure from the market dominance guidelines, which state that "effective competition" may be "deduced" from exactly this type of evidence.

It does not matter if any single piece of evidence standing alone can establish market dominance, because the market dominance guidelines require a holistic approach. Market Dominance Determinations, 365 ICC at 120 ("determining the degree of competition faced by a rail carrier" depends upon "numerous" and "varied" factors). See, e.g., E.I. du Pont de Nemours and Company v. CSX Transportation, Inc., STB Docket No. 42099, slip op. at 7-8 (served June 30, 2008) (Applying a holistic approach to the same type of traffic data as M&G has presented, concluding that "weighing all of the evidence, we find that CSXT has market dominance..."). Thus, even if the traffic data, standing alone, is insufficient, all of the foregoing evidence

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together overwhelmingly demonstrates the limited circumstances of truck transportation in the polymer industry. The Board's failure to consider all of this evidence, and to do so in a holistic manner, was material error.

Viewed in the aggregate, the Board basically concluded that M&G's traffic data for all lanes could be ignored based on the fact that a few trucks were used on a few lanes, without any consideration of the circumstances in which trucks are used. This blatant disregard by the Board for its own precedent is classic material error. Cf. Amstar Corp. v. The Alabama Great Southern R.R., ICC Docket No. 38239S, slip. op. at 2 (served Dec. 2, 1987) ("Amstar-AGS") ("We find that the Review Board incorrectly relied upon potential competition for some of the routes as sufficient to hold all of the challenged rates to reasonable levels.").

The ICC previously was overruled on appeal for similarly disregarding evidence that is relevant under the market dominance guidelines. Arizona Public Service Company v. United States, 742 F.2d 644 (D.C. Cir. 1984). The complainant had provided evidence that railroads carry a much greater percentage of its commodity than do trucks. The court strongly rebuked the ICC for disregarding that evidence:

Petitioner submitted probative evidence of precisely the kind that the Commission's rules encourage complainants to submit, and the Commission may not refute that evidence with the bald statement that such evidence is not absolutely conclusive on the issue. The reasoned decision making requirements of Section 10 of the APA preclude setting this kind of trap for an unwary litigant.

Id., 742 F.2d at 650. In M&G's case, the Board has committed the same error.

2. The Board erred in its interpretation and application of its precedent.

In support of its decision to disregard M&G's traffic volume evidence, the Board cited two ICC decisions. See Decision at 27. However, the Board erroneously interpreted and/or applied each of these decisions.

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The Board cited Amstar Corporation v. The Atchison, Topeka and Santa Fe Railway Company, ICC Docket No. 37478, slip op. at 7 (served Dec. 8, 1987) (“Amstar”), for the proposition that effective competition could exist where the complainants had shipped “98.5% of the issue movements by rail.” That characterization does not conform to the facts of that case.

Of the more than 40 lanes at issue in the case, the ICC determined that “[w]ith the exception of movements to the two destinations in Arizona, *we find that market dominance has been shown.*” Id. at 1 [italics added]. In support of that finding, the ICC noted that “[d]uring the complaint period, 98.5% of the corn syrup that Amstar shipped to the destinations at issue moved by rail.” Id. at 6. This was an aggregate figure for *all* of the issue movements, not just the two lacking market dominance. The decision does not state what percentage of truck shipments existed on those two lanes. The ICC noted that the 98.5% rail market share in fact “does suggest a lack of intermodal competition,” but it was not willing to rely solely upon this aggregate figure to find market dominance in every lane, because it is “based solely on Amstar’s shipments, which might simply reflect Amstar’s own preferences.” Id. The agency went on the state that, “[t]he absence of a significant motor carrier share for similar movements *would indicate* that motor carrier competition was not effective for the movements at issue.” Id. [italics added]. Because the defendant was able to demonstrate similar truck movements for two of the destinations, the ICC concluded that there was effective competition.

In this proceeding, M&G presented evidence that its own PET shipments moved overwhelmingly by rail, which the ICC noted in Amstar “does suggest a lack of intermodal competition.” M&G also presented evidence, beyond just its own traffic, that 90% of *all* plastic resins produced in North America are shipped by rail and that the entire distribution network for the polymer industry is built around rail cars. See Op. Ev. at II-B-20-25; Reb. Ev. at II-B-24-27

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and Ex. II-B-15, p. 4. This is precisely the type of evidence the ICC found lacking in Amstar. Furthermore, a major reason why the ICC found market dominance for all the remaining lanes in Amstar was the complainant's substantial investment in rail-related facilities that tied it to rail. Amstar, slip op. at 8.¹⁰ M&G has presented extensive evidence that not just it, but the entire polymer industry, is similarly tied to rail. See Op. Ev. at II-B-4-10; Reb. Ev. at II-B-24-25. Thus, it was material error for the Board to rely on Amstar to discount M&G's evidence of traffic volumes by mode and by lane.

Based upon Platnick Brothers, Inc. v. Norfolk & Western Railway Company, 367 ICC 782, 786 (1983), the Board stated that a low market share does not "necessarily" imply that movement of PET by trucks is infeasible. See Decision at 27. In that case, however, the ICC found compelling the fact that "substantial" volumes of the issue commodity had been delivered to the consignee from origins not covered by the complaint. CSXT did not present any such similar evidence regarding any of the 69 lanes in this case. In fact, it was M&G that provided unrefuted evidence showing that nearly all of the issue destinations received zero, or *de minimus*, truck shipments from M&G in the 5-year time period covered by M&G's evidence.¹¹ There is no evidence in the record that any of the consignees in the 69 lanes have received "substantial" PET volumes by truck from other origins. In the absence of such evidence, Platnick does not justify the Board's dismissal of M&G's traffic volume evidence.

¹⁰ See also Amstar-AGS, slip. op. at 2 (Significant investments in rail infrastructure "substantially diminish the likelihood that intermodal competition on any broad scale is a practical transportation alternative....").

¹¹ For the 9 lanes where the Board found effective competition existed, Lanes {{
}} had no truck shipments at all. See Op. Ex. II-B-5.

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D. The Board's failure to consider the advantages of rail transportation over truck transportation was material error.

Although the Board identifies certain advantages of truck transportation,¹² it commits material error by extrapolating those advantages, which exist only in limited circumstances, to all of the issue movements, while at the same time ignoring the much greater advantages of rail transportation in the vast majority of circumstances. The Board never weighs the relative advantages of truck versus rail to determine which offers the greater benefit for a particular lane (e.g. a short distance move renders rail car storage less significant; a small volume movement makes truck delivery more practical). The Decision does not appear to even acknowledge that rail transportation has any advantages over direct truck shipments. Such a conclusion is inconsistent with the overwhelming use of rail by M&G and the polymer industry as a whole.

As M&G stated in its Reb. Ev. at II-B-67, “rail is the most attractive option for most of M&G’s customers under most conditions.” M&G then proceeded to summarize the relative advantages and disadvantages of truck and rail transportation, noting that truck and rail operate primarily in non-overlapping spheres. *Id.* at II-B-67-70. CSXT itself admits that “the convenience of rail car storage...might make rail transportation an attractive option.” *See* Reply Ev. at II-51. *Cf.* Reb. Ex. II-B-3 (CSXT witness Gordon Heisler states that “[v]irtually all” of Sunoco’s “polymer product is shipped by rail in hopper cars.”). But, when evaluating the rebuttal presumptions created by the newly-adopted LP methodology, the Board refers only to the “intangible features” of trucking, never discussing the countervailing “intangible features” of rail transportation. Indeed, the only positive attribute of rail service mentioned in the Decision is a “presumed” shorter transit time than transload alternatives. *See, e.g.,* Decision at 56 (n. 254).

¹² *See* Decision at 37-38 and 60 (n. 275).

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Despite M&G's significant evidence of the many benefits of rail service, many of them unrefuted by CSXT, the Board has erroneously ignored these benefits.

Even if M&G had not introduced such extensive evidence of the advantages of rail transportation, the Board need not look any further than its own precedent to find ample examples of the benefits of rail over trucks. M&G expressly cited to Shippers Committee, OT-5 v. The Ann Arbor Railroad Company, 5 I.C.C.2d 856, 857 (1989), to illustrate the Board's own prior acknowledgement of the important role played by covered hoppers as storage vessels throughout the supply chain. Reb. Ev. at II-B-60. See also GWI Switching Services, LP – Operation Exemption – Lines of Southern Pacific Transportation Company, STB Docket No. 32481, slip op. at 2 (served Aug. 7, 2001) (“[I]t has been the practice [of polymer manufacturers] to load the pellets into shipper-controlled covered hopper cars for Storage-In-Transit.”); Union Pacific Corporation, et al. – Control and Merger – Southern Pacific Rail Corporation, et al., 1 STB 233, 426 (1996) (“There is widespread agreement among the parties that SIT capacity is a critical element in service to the plastics industry.”). Numerous other court and agency decisions also have long-recognized the frequency and value of using rail cars for storage purposes.¹³

¹³ E.g., Turner, Dennis & Lowry Lumber Company v. Chicago, Milwaukee & St. Paul Railway Company, 271 U.S. 259, 262 (1926) (recognizing that rail cars are sometimes employed “as a place of storage, either at destination or at reconsignment points”); Illinois Central Railroad Company v. Texas Eastern Transmission Corporation, 533 F.2d 272, 274 (5th Cir. 1976) (stating that rail cars may be used “for storage after the shipment has reached a destination”); Car Service Compensation – Basic Per Diem Charges, 358 ICC 716, 762 (1977) (Railroad parties contend that “[p]rivate cars spend much of their time being used for storage rather than movement.”); Joint Line Cancellation on Soda Ash by Union Pacific Railroad Company, 365 ICC 951, 959 (1982) (UP states that “private cars are often used for storage at destination.”); Allied Corporation v. Union Pacific Railroad Company, 1 ICC2d 480, 481 (1985) (noting that private car ownership “offers several advantages,” including storage); Southern Pacific Transportation Company, et al. – Exemption – Waiver of Undercharges, ICC Docket No. 40204, 1989 MCC Lexis 204 (April 10, 1989) (Railroad contract amended “to permit storage of the commodity in rail cars on leased track at the destination.”).

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Despite this overwhelming precedent and M&G's own evidence, the Board has failed to recognize the many benefits of rail transportation over trucks. The only explanation provided is the incorrect assertion that M&G did not submit evidence showing that trucks can never be used for storage. Decision at 28. Trucks cannot be used for storage for the clearly stated reason that, in contrast to the leased private rail cars, M&G does not own or lease the truck trailers. Op. Ev. at II-B-23-24; Reb. Ev. at II-B-60-63, 68. Consequently, M&G would incur significant demurrage costs if its customers were permitted to detain truck trailers for the same duration that they detain the private rail cars that M&G leases, which on average was {{ }} in 2010.¹⁴ See Op. Ex. II-B-7. To provide the same amount of PET to its customers, M&G would have to own or lease four times the number of trucks as it has rail cars. The Board also notes that M&G has relied upon Mr. Granatelli's testimony, which has been stricken from the record. See Decision at 28, n. 84. For the reasons stated in Part III.B, above, that too was material error. Nevertheless, M&G's other evidence and the Board's own precedent amply demonstrate the essential advantages of rail to the polymer industry.

E. The Board erroneously determined that double-transloading is feasible.

The Board has concluded that "[i]t is clear from the record that M&G does not 'double transload' PET in the normal course of its business." See Decision at 32. The evidence also shows that double transloading occurs in the polymer industry only in exceptional, isolated circumstances. See Op. Ev. at II-B-31-32; Reb. Ev. at II-B-71-84. CSXT did not present any

¹⁴ For example, motor carrier contracts in M&G's evidence show that {{

)} In the Opening Workpapers, find Bulkmatic rates in M&G-HC-014781, which is found in folder "Truck contracts", then folder "Bulkmatic", then folder "Oct. 2010 Bulkmatic Rates". R&J Trucking rates are in M&G-HC-017315, which is found in folder "Truck contracts", then folder "R&J Trucking", then folder "2011 rate change notice". Based on these costs for holding trucks, M&G would incur significant demurrage charges to hold a single truck at a destination for an average of {{ }}.

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evidence that M&G or any other polymer producer delivers product to a customer via a double transload in the ordinary course of business. See Reb. Ev. at II-B-45 and 72. Despite this overwhelming evidence showing no actual real-world double-transloading, the Board determined that double transloads are feasible alternatives for CSXT rail service. See Decision at 34. The Board's determination was material error because it is unsupported by the evidence. This error led the Board to consider double-transload alternatives for the following ten issue movements: Lanes B-7, 9, 16, 21, 22, 25, 26, 30, 33, and 36.

1. It was material error to ignore M&G's evidence on the infeasibility of truck-to-rail transloading.

Double transloading means that PET must be transloaded both into and out of a rail car on the same trip. Therefore, the Board's determination that double-transloading is feasible necessarily requires a determination that truck-to-rail transloading is feasible. But, the Decision does not contain any discussion of the evidence on truck-to-rail transloading.

All evidence of record in this proceeding shows that truck-to-rail transloading does not occur in the ordinary course of business in the polymer industry. See Op. Ev. at II-B-31-32; Reb. Ev. at II-B-45. Although industry guides for handling polymers contain detailed descriptions of transloading, they conspicuously lack any discussion of truck-to-rail transloading. See Reb. Exs. II-B-15 and 16. Moreover, CSXT has not pointed to any truck-to-rail transloading that actually occurs in the polymer industry, except in exceptional and isolated circumstances.¹⁵ See Reb. Ev. at II-B-45 and 72-73. In fact, CSXT's sister company TRANSFLO specifically defines transloading as "transferring products from rail to truck." See Reb. Ex. II-B-14.

¹⁵ This failure by CSXT is highly relevant because TRANSFLO claims to be the "largest rail-to-truck transloading network in North America" and operates 57 terminals throughout the eastern United States. See Reb. Ex. II-B-14. TRANSFLO does not even claim to offer truck-to-rail transloading (though it does offer rail-to-truck). See Reb. Ev. at II-B-22 (n. 40). If truck-to-rail transloading was common in the polymer industry, CSXT should have some evidence to show it.

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M&G's evidence also shows that product integrity concerns are even greater for truck-to-rail transloading than for ordinary rail-to-truck transloading. See Reb. Ev. at II-B-45. Truck-to-rail transloading requires use of a covered transload location because the top hatch of the rail car must be open during the transload. See Reb. Ev. at II-B-19, 45, and 89. Without a covered area, the rail car would be susceptible to contamination (precipitation, dust, leaves, organic matter, etc.). In addition, truck-to-rail transloads require longer hoses, more hose curvature, and longer transload times, which are all factors that create more dusts, fines, and streamers than an ordinary rail-to-truck transload. Id. at II-B-45. The Decision does not address any of these issues, but instead treats truck-to-rail transloads as if they are no different from an ordinary rail-to-truck transload.

The Board also ignored significant evidence, in addition to product integrity issues, that render truck-to-rail transloading infeasible. For example, it did not address the logistical problems inherent in appropriately planning and staging rail cars to accept the transloaded material from trucks. See Reb. Ev. at II-B-29, 98, and 129-130. This omission is all the more glaring in light of the Board's recognition that trucking from Apple Grove to Belpre (Lane A-1) was not effective due to "the necessity of M&G pre-positioning a significant number of empty railcars at Belpre solely to function as receptacles of the inevitable transload necessitated by direct trucking." See Decision at 58. Any truck-to-rail transload requires the same pre-positioning of rail cars, which means that this issue should preclude the feasibility of any double-transload. The inconsistency of the Board's Decision on this issue is material error.

In short, the Board made no finding that truck-to-rail transloading is feasible and there simply is no evidence to support its feasibility. Moreover, the one finding that the Board did make, on the need to pre-position of rail cars, supports M&G's position that such transloading is

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not feasible for delivering PET to customers in the ordinary course of business. Therefore, because truck-to-rail transloading is necessarily part of every double transload, the Board's conclusion that double-transloading is feasible was material error.

2. It was material error to rely upon the ALP as support for the feasibility of double-transloading.

The only reason provided by the Board for concluding that double-transloading is feasible is the Alternative Logistics Plan ("ALP"). See Decision at 33-34. {{

}}¹⁶ The Board apparently was influenced by the fact that M&G did not "provide any contemporaneous documentation specifically explaining why the ALP study recommendations were not implemented." See Decision at 33. No such documents were provided because none exist. See Reb. Ev. at II-B-38. The Board has given undue significance to this fact when weighed against all of the evidence that no polymer producer engages in double transloading to serve any customer in the ordinary course of business.

In rejecting M&G's double-transload argument based upon the ALP, the Board noted that "the relevant issue in the context of the threshold feasibility analysis is not whether the proposed

¹⁶ The Board incorrectly asserts that M&G elected not to discuss the ALP in detail in its Opening Evidence. See Decision at 33, n. 117. M&G explained the circumstances surrounding the ALP and why it was not feasible at pages 50-54 of its Reply to CSXT's Motion for Expedited Determination of Jurisdiction Over Challenged Rates (filed Feb. 18, 2011). M&G incorporated that earlier explanation in its Opening Evidence at p. I-3 (n. 4). M&G rebutted CSXT's assertions about the ALP at pages II-B-34-38 of its Rebuttal Evidence.

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ALP alternatives would be economically effective, but rather whether they provide some support for the general proposition that double transloading is a practically feasible alternative to transporting M&G's PET by railcar." See Decision at 33-34. Earlier in the Decision, the Board very clearly states that it is using the term "feasibility" to describe "the concept of 'practical feasibility'—i.e., whether an alternative is possible from a practical standpoint given real-world constraints." See Decision at 3, n. 5 [underline added]. Yet, in relying upon the ALP, which was never implemented in the "real-world," the Board gives more credence to a theoretical proposal considered as a last desperate act to avoid a rate case than it does to all of the contrary "real-world" evidence that is in the record.

M&G's company witnesses have testified, and the Board concluded, that M&G does not double transload in the ordinary course of business (Reb. Ev. at II-B-78-84; Decision at 32); Mr. Granatelli has testified that no other company double transloads in the ordinary course of business (Reb. Ev. at II-B-28-30); and M&G has submitted documentary evidence that 90% of all polymer shipments originate by rail (Reb. Ex. II-B-15, p. 4).¹⁷ There is no evidence in the record that anyone in the polymer industry engages in double-transloading as a means to serve a customer in the ordinary course of business. Defendant CSXT has not pointed to any double-transloading that regularly occurs in the polymer industry. CSXT's witness, Gordon Heisler, while hypothesizing that double transloading can be done, does not point to a single customer that his former employer, Sunoco, served via a double transload. Nor does he point to any examples of other polymer producers that did so. If double transloading was practically feasible, not just physically feasible, surely CSXT would have presented such evidence through Mr. Heisler or the experience of TRANSFLO. It has done neither.

¹⁷ If a shipment originates by rail, it is likely to be transloaded only once from the rail car into a truck. Double transloading would require a rail-truck-rail combination.

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Despite this compelling evidence in the record, the Board has determined that double-transloading is a perfectly acceptable manner of business in the PET industry, when nothing could be further from the truth. See Decision at 34. The Board’s reliance upon the theoretical ALP in disregard of the real-world evidence in the record was material error.

F. The Board committed material error by using the incorrect alternative transportation prices for Lanes B-5 and B-50.

The Board used the incorrect alternative transportation price for two of the nine lanes where the Board found the existence of effective competition. Lanes B-5 (Altamira – Clifton Forge) and B-50 (Sweetwater – Clifton Forge) both rely upon CSXT for the movement from New Orleans to Clifton Forge. CSXT proposed alternatives of rail service from New Orleans to Petersburg, VA, followed by a truck shipment from Petersburg to Clifton Forge. See Reply Ex. II-B-2 at p. 16 and 57. CSXT calculated a total price of {{ }} for this New Orleans to Clifton Forge alternative. Id. The Board used the CSXT-calculated price for determination of the limit price to variable cost (“LP/VC”) ratio, but CSXT’s price is incorrect.

M&G explained that the correct rate for this movement is {{ }}. See Reb. Ev. at II-B-173 and 275. The exact differences between the rate calculated by CSXT and the actual rate shown by M&G are demonstrated in M&G’s Rebuttal Workpaper “Alternative Rates Restated” (which is located in the folder “Transportation Rates”). In that workpaper, M&G cited to the exact page numbers in the workpaper contracts and tariffs supporting the rates. It is not entirely clear how and/or why CSXT developed an incorrect rate for this movement because CSXT did not support its rate with detailed citations to sources, although it appears that CSXT may have used a mountainous route that is not used by heavy trucks.¹⁸ See Reb. Ev. at II-B-173. In

¹⁸ See CSXT Reply Workpaper “Backup for CSXT Reply Ex II_B_3”.

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contrast, M&G has cited to and included the actual sources for its rate. The Board should use a price of {{{ }} for the alternative transportation because M&G provided the better evidence.

Use of {{{ }} results in a LP/VC of {{{ }}. Based on this new LP/VC in conjunction with the other evidence submitted by M&G, the Board should find that CSXT has market dominance over Lanes B-5 and B-50.

Although the Board used the lowest alternative rate in the record for every case lane without evaluating whether the M&G or CSXT rate was correct, that was a conservative, and thus reasonable, approach for most of the lanes because the LP Methodology indicated a preliminary conclusion of market dominance even at the lowest possible alternative rates. For Lanes B-5 and B-50, however, the LP Methodology suggested a preliminary conclusion of effective competition based upon the lowest rate calculated by CSXT, even though M&G has presented evidence that the CSXT rate is understated. Because this understatement would change the preliminary conclusion under the LP Methodology, it was material error for the Board not to determine which rate is correct for these two lanes.

IV. CONCLUSION.

As described herein, M&G respectfully requests that the Board reconsider its Decision.

Respectfully submitted,



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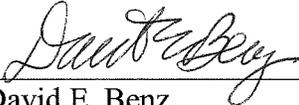
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CERTIFICATE OF SERVICE

I hereby certify that this 17th day of October 2012, I served a copy of the foregoing upon counsel for defendant CSXT via electronic mail, and first-class mail postage pre-paid at the address below:

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